



**KURUMA  
MARTHUDUNERA**  
ABORIGINAL CORPORATION RNTBC  
ICN 7612

Unit 5/ 9 Hedland Place  
PO Box 1944, Karratha  
WA 6714

E admin@kmac.org.au  
T (08) 9183 8217  
W kmac.org.au

Ms Gail McGowan  
Director General  
Department of Planning, Lands and Heritage  
Locked Bag 2506  
Perth WA 6001

Via email: [AHAreview@dplh.wa.gov.au](mailto:AHAreview@dplh.wa.gov.au)

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Dear Ms McGowan

#### **REVIEW OF THE ABORIGINAL HERITAGE ACT 1972 – PHASE 2 – CONSULTATION PAPER MARCH 2019**

Thank you for the opportunity to provide feedback on nine proposals to reform the current *Aboriginal Heritage Act (1972) (AHA)*. Kuruma Marthudunera Aboriginal Corporation RNTBC (KMAC) is the appointed Heritage Body and Registered Native Title Body Corporate (RNTBC) for the Robe River Kuruma (RRK) People, also known as the Kuruma and Marthudunera People. The RRK People have traditional rights and interests to an area covering about 15 759 square kilometres in the Pilbara region. Within this area is the township of Pannawonica and the Robe River system, *Jajiwurra* that runs through RRK country. It has long been considered the ‘lifeblood of the RRK People’ and embodies cultural values relating to sacred beliefs, laws and customs.

KMAC on behalf of the RRK People believe many of the proposals will result in improved Aboriginal cultural heritage legislation for the benefit of all Western Australians. The many shortcomings of the current legislation have been clearly identified in the Department of Planning, Land and Heritage (DPLH) Review. KMAC is pleased that the new proposals being submitted will assist in reconciling the range of rights and interests the RRK People hold under the *Native Title Act (1993) (NTA)*. KMAC provides the following feedback regarding the proposals, giving consideration as to whether each meets the aim of ‘providing modernised legislation that will recognise, protect and celebrate WA’s cultural heritage’ as stated by the March 2019 *Consultation Paper*.

#### **Proposal 1 – Repeal the *Aboriginal Heritage Act 1972* and deliver new Aboriginal heritage legislation.**

KMAC supports this proposal and the rationale that ‘the weight of feedback’ suggests that the amount of ‘amendments necessary to correct the problems in the current legislation means that developing an entirely new Act would be more effective than attempting further amendments of the current Act’ (March 2019 *Consultation Paper*). Development of a new Act is in line with other Australian states who have modernised legislation which prescribes Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage. In recognising these changes and the shift to heritage management and frameworks that respect Aboriginal cultural heritage KMAC would suggest renaming the Act to the *Aboriginal Cultural Heritage Act* or something similar, rather than keeping the existing name.



## **Proposal 2 – Update definitions and scope of new Aboriginal heritage legislation.**

KMAC welcomes the definition of place in the new legislation that is aligned with the *Burra Charter*. This definition recognises ‘interconnected heritage places’ and does not view sites in isolation from one another. It is also a positive change that aligns heritage places with RRK People’s view of their Country. *Jajiwurra*, the Robe River, is an excellent example of this. It is often described as the ‘main artery of RRK Country’, and the RRK People’s identity, their place in the world and that of the river cannot be separated. Another excellent example is the Gunarika Cultural Precinct, which is located deep in the Hamersley Range. The precinct is made up of a network of cultural places connected by a dreaming narrative, which cannot be viewed as distinct and isolated sites.

KMAC’s Heritage Advisory Committee (HAC) was established to be cultural governance advisers to the KMAC Board; as a resource and reference point for KMAC management on culture and heritage projects and programs; and as a key body within KMAC’s PBC structure and native title decision making process. The HAC supports KMAC to walk in ‘two worlds’ to balance legislative compliance with cultural legitimacy and to ensure KMAC deliver on our PBC responsibilities to hold, manage and protect native title rights and interests.

The HAC provide input into assessing all applications put forward by proponents who are seeking consent to operate and develop their interests on RRK Country. This is an internal practice that surpasses the usual archaeological and ethnographic survey process that vets cultural heritage sites within proposed land use areas. KMAC has implemented this approach internally as Heritage Agreements with proponents and surveys carried out under the auspices of the *AHA* often fail in documenting and recording heritage values and sites and the expectations of the RRK Traditional Owners involved, and the RRK community as a whole.

As an example of the interconnected nature of sites and places on RRK Country, the HAC play an instrumental role in reviewing and providing comment on Heritage Information Submission Forms (HISFs) submitted for the purposes of a section 16 or section 18 assessment by proponents seeking to perform work on RRK Country. This approach treats each site in isolation from another. The HAC work tirelessly to provide comments to document the importance of their heritage and aid in the protection of sites and places on RRK Country. They consistently comment that such sites and places are part of a cultural precinct, of the interconnected mesa landforms, or that sites are part of both ancient and contemporary cultural pathways through Country. Definitions of place that align with the internationally recognised *Burra Charter* are a step in the right direction in recognising these interconnected landscapes.

KMAC reject the current definitions in the *AHA* with the inclusion of terms such as ‘of archaeological’ and ‘of ethnographic’ significance. Whilst heritage professionals such as anthropologists and archaeologists have a role to play, it is Aboriginal People who ultimately determine what significance should be attributed to sites, places, cultural landscapes and precincts with the assistance of these professionals if they so decide.

It is proposed that the scope of the new legislation will include ancestral remains, as there is no provision in the current Act to care appropriately for them. KMAC supports the inclusion of culturally appropriate procedures to deal with ancestral remains. KMAC suggest that for given geographic areas, the proposed Local Aboriginal Heritage Service (LAHS) (see Proposal 3A) are identified as the primary agents in these procedures.

### **Proposal 3(A) - Local Aboriginal Heritage Services (LAHS).**

For the RRK People this is a function that KMAC already performs as a RNTBC and it will be recognised in the proposed legislation.

Currently decision making processes regarding developments, section 16 and section 18 applications, deciding whether a heritage site or object should be registered lays in the hands of the Aboriginal Cultural Material Committee (ACMC) who are not custodians nor knowledge holders for RRK Country. Therefore it is not culturally appropriate under Aboriginal law and custom for them to make these decisions. It is critical that it be mandatory that KMAC, as the Local Aboriginal Heritage Services (LAHS) for RRK Country, must be consulted, and has autonomy in decision making processes for their recognised Country.

It is also proposed that the LAHS will be the first point of contact for proponents seeking advice on heritage matters within a particular area and to undertake and/or coordinate surveys on heritage matters. This proposal reflects how KMAC and other PBCs have evolved to perform this function and KMAC is pleased to see it enshrined in the new legislation. This will suit already established PBCs.

It is anticipated that PBCs will apply to become a LAHS. With this in mind it is important that the Aboriginal Heritage Council (AHC) has streamlined processes for PBCs to be recognised who are already undertaking this role to make this transition easier under the new legislation. Additionally there needs to be funding made available for PBCs to undertake the proposed role and responsibilities of a LAHS as described in the new legislation. The LAHS could employ a model similar to that in Victoria, where fees for different services are charged, and this is defined in the legislation. This would provide funding to support these additional services.

KMAC does have concerns about those Traditional Owner and Aboriginal Groups that do not have a PBC or Corporation to perform this function. Whilst DPLH have said they will do this in their absence, there are plenty of identified Traditional Owner Groups for country, who may be at different stages in the progression of their native title claim or have had it dismissed. There would need to be processes that are followed and carefully documented if and when the DPLH performs this role so that any questions of cultural authority when making such decisions are justified, and efforts to consult with the right people were made and documented. This process would need to be approached with caution and included in the proposed legislation. In this case, an option should be made available for Traditional Owner and Aboriginal Groups to nominate a LAHS on their behalf, who they view as having cultural authority in these matters, rather than the DPLH.

### **Proposal 3 (B) Aboriginal Heritage Council.**

KMAC is in favour of the current ACMC being abolished. The establishment of an Aboriginal Heritage Council (AHC) is long overdue, and it is essential that a panel of heritage experts are able to provide strategic advice in Aboriginal heritage management, land use and proposals, when required. A Council such as this brings Aboriginal heritage in line with non-Aboriginal heritage in Australia, comparing it with the Heritage Council of Australia.

KMAC is supportive the proposed roles of the AHC in regards to agreement making (see Proposal 6) and having a mandate to promote Aboriginal heritage and values amongst the non-Aboriginal community in Australia. This is an important step in awarding Aboriginal heritage with the respect and significance that it deserves.

The necessary funding must be made available for the new AHC to have an impact in both the area of agreement making and promoting Aboriginal heritage. A baseline needs to be established so that any success relating to outcomes in this area can be measured. Standards could be established through a consultation process with Traditional Owner and Aboriginal Groups. This is essential for transparency and accountability. Members of the AHC need to be suitably qualified to successfully deliver on these roles.

**Proposal 3 (C) The Minister’s Role and Proposal 3 (D) The Role of the Department of Planning, Lands and Heritage.**

It is proposed that the Minister may delegate decision making to the Aboriginal Heritage Council in respect of land use proposals that may impact on Aboriginal heritage values. KMAC supports such a mechanism of delegation provided the AHC and supporting unit include Traditional Owner identified positions filled by those with requisite skills and cultural competencies.

Transparency in accountability and decision-making is critical in the delivery of powers for the Aboriginal heritage system in Western Australia through an adequately funded AHC and the Department of Planning and Land Heritage.

**Proposal 3 (E) Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards.**

KMAC support improving professional standards of practice for heritage professionals and reporting standards. The proposed approach to create a Directory of Heritage Professionals is a positive step, however KMAC would prefer to see minimum standards set for reporting and mapping which could be used as templates for heritage survey reports and provision of spatial data, both archaeological and ethnographic, similar to the Victoria Cultural Heritage Management Plan process under the *Aboriginal Heritage Act 2006* (Victoria). PBCs such as KMAC must be meaningfully involved in the development of such templates and reporting standards.

In the RRK region, there is currently great variability in this information as it is set by different proponents in their scope of works when commissioning a heritage survey, or within the heritage agreement. Heritage surveys and agreements differ from proponent to proponent and are not all of the same quality.

**Proposal 4 – Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register.**

The current Aboriginal Register of Places and Objects is very important, and moves that will improve its accuracy is welcomed. Standardising language and methods of spatial reporting are important in this regard.

KMAC has concerns about what would happen regarding current lodged places on the Register and those places waiting to be assessed. The explanation given for the rationale in the *Consultation Paper* is that there will be no requirement for a place to be assessed by a central body in order for it to be recorded on the register, rather a place will only need to be identified by Aboriginal People, or have scientific value. This will be sufficient evidence along with a given location.

The Register will require to be resourced to deal with the large backlog of places that require their location to be verified, and this will need to be undertaken by the DPLH. For example, in KMAC's experience we have been contacted by DPLH on numerous occasions to provide better information, including location accuracy, of sites on RRK Country that may have been recorded 10, 20 or 30 years ago, but the organisation does not have the support or resources to research these sites. Usually sites are only dealt with on RRK Country if they are in threat or being assessed as part of a proposed development on Country by a proponent. KMAC would like to know what the status of these sites will be on the Register, until information is sufficiently gathered or provided, and whether this will be resourced by the DPLH.

#### **Proposal 5 – Introduce a referral mechanism to facilitate tiered assessments of proposed land uses.**

In the current climate that KMAC operates in, any land use proposals that will affect Aboriginal heritage sites and places are documented through the submission and consent to section 16 or section 18 applications to the ACMC by proponents. Agreements that KMAC have in place with different proponents ensure that land use is assessed prior to any works occurring. KMAC employs two tiers to assess land use and has a definition for each: low impact activities and ground disturbing works. The nature of the proposed works are assessed through these two tiers that determines whether the recommendation is made or not for a heritage survey to take place.

KMAC suggest that new reforms take a similar approach to facilitate tiered assessments, and define these as KMAC has done within its agreements. For example, low impact activities are defined as those not involving significant ground disturbance, including (without limitation): geophysical surveying; traversing the land on foot or by vehicles; maintenance or rehabilitation of pre-existing tracks; and erecting tent or caravan camps not involving heavy vehicles or water bores. Ground Disturbing Activity means an activity that that will or is likely to disturb the surface of the land or waterways; and that is not Low Impact Activity.

It is important that any legislation enables the Aboriginal people concerned, through the proposed LAHS, to determine the need for, and level of, heritage surveys, depending on the nature of proposed works, using (as an example) the above two tiers of assessment as a guide. KMAC views this as a step towards assisting Aboriginal People in having an active role in their land management. The Aboriginal community concerned, through their LAHS should have the first and last say on this and provide guidance to land users, developers and the DPLH.

#### **Proposal 6 – Encourage and recognise agreement making.**

KMAC as a RNTBC has been entering into agreements with proponents for many years, which all differ. Some agreements predate the organisation. The older agreements carry forward with them legacy issues. As time has passed KMAC has taken learnings to develop and refine its own preferred Standard Heritage Agreement.

Agreements in place on RRK Country that predate the establishment of KMAC are prescriptive. They are similar to the current *AHA* in that they are not in step with changes in the political and social context of Aboriginal heritage, and in some cases global heritage, that have occurred over time. Some aspects of agreements are so limiting for Aboriginal people that they may curtail rights held under Australian law. These predated agreements do not reflect best cultural heritage practice in respect to managing heritage on RRK Country, the role that RRK People want to play in this, and how they view what self-

determination is looking after their Country. Most of these agreements were signed before the RRK People's native title was recognised.

If the AHC takes an active role in considering and ratifying agreements, KMAC supports this. This role by the AHC will promote transparency in the Aboriginal heritage agreement space. Instead of these agreements being confidential between KMAC and the proponent, the AHC will be able to promote and share with other LAHS, Aboriginal groups and corporations what best practice agreements look like.

The AHC may find that old agreements can be deemed to not meet the standards of the new Act, because they are outdated, carry with them historic legacy issues, and/or were negotiated through an inequitable process. As part of this proposal, KMAC would suggest that a voluntary system is in place where agreements between Aboriginal groups and proponents are formally certified and identified in a directory or similar on the DPLH website. When a proponent has an agreement certified (or recognised) by the AHC, this can bolster their reputation and contribute towards their 'social licence' to operate. They become known as a Company that promotes and protects Aboriginal heritage, and promoting cultural best practice. Those proponents who do not have certified agreements will not be viewed as favourably by Aboriginal groups. Aboriginal Groups and their PBCs may be deterred from conducting business with them if they do not ratify and certify their agreements with the AHC. It is also possible that Aboriginal Groups and PBCs will insist this a precondition to signing their agreement. A process in which agreements are formally ratified and certified by the AHC will encourage all proponents to be transparent and open about their agreements, in turn promoting best practice in Aboriginal cultural heritage management.

#### **Proposal 7 – Transparency and Appeals**

As discussed in Proposal 6, transparency is key and KMAC support this proposal. Furthermore, KMAC supports the move to provide Aboriginal people same rights of review and appeal if they are aggrieved by a decision on proposed land use and other administrative decisions.

#### **Proposal 8 –A Modernised Enforcement Regime.**

KMAC supports lifting the limitation period from 12 months to five years from the time of the offence. This is essential as many sites within RRK Country are remote and are of difficult access and terrain. RRK country is vast and any offences committed may not be discovered for a period of time, certainly not within the current 12 month timeframe.

The Proposal to maintain the current range of offences should be expanded to place obligations upon individuals and companies to report a breach if one is aware of it, and make failing to report a breach an offence under the new legislation.

KMAC is pleased to see that the March 2019 *Consultation Paper* acknowledges that the defence of ignorance is not considered appropriate as the Act has been law since 1972. However, KMAC would argue that limiting 'the ignorance defence to circumstances in which the land use proponent has done everything 'reasonably practicable' to make themselves informed' is weak in this regard and could be utilised willy-nilly by proponents defending themselves. A tiered approach to assess the ignorance offence should be employed.

Penalties, other than monetary fines should also be considered for large scale Companies with sufficient funds to pay fines and continue their operations. Monetary fines would not necessarily deter them if they saw higher value in mining the minerals which they would access by destroying or damaging a heritage site. Penalties should be expanded to include suspending operations for a period of time should an Aboriginal heritage site be damaged or destroyed.

### **Proposal 9 – Protected Areas**

This proposal should tie in with Proposal 2 regarding definitions of interconnected Aboriginal Heritage Places. The rationale is given in this section to capture Aboriginal places and the definition that is given by the *Burra Charter* includes sites that are part of an interconnected landscape, or cultural precinct. These are areas that would be excellent examples of Protected Areas. These cultural landscapes may be a conglomeration of sites linked by their proximity, the same songline, or a story. Provision for Protected Areas in this proposal should encourage Aboriginal People to declare these areas where outstanding importance is recognised – thus the process to make a case for such Protected Areas should be made easier.

### **Conclusion**

KMAC, as the RNTBC for the RRK People, is supportive of many of the proposals being put forward by the Minister for Aboriginal Affairs to review the *AHA*. KMAC has included in this submission suggestions to administrate many of the new proposals being put forward, particularly in regards to agreement making.

Overall KMAC is pleased to see the Minister for Aboriginal Affairs and the DPLH consult widely and take a pro-active and inclusive approach to seek comment and feedback towards these important new proposals. This approach has raised community expectation that changes to the *AHA* will occur and the RRK community and others would be discouraged if changes are not made. It is hoped that proactive and inclusive meaningful consultation will continue in the delivery of the *AHA* and in establishing the necessary standards required to encourage a move towards cultural legitimacy within the Aboriginal Community.

KMAC supports the publication of this Submission on the website.

If you have any queries or wish to discuss this matter further, please do not hesitate to contact KMAC's Chief Executive Officer Aoife McMahon on (08) 9183 8217 or via email [a.mcmahon@kmac.org.au](mailto:a.mcmahon@kmac.org.au).

Yours Sincerely



Aoife McMahon  
**Chief Executive Officer**